

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VIOLA GORDON)	DOCKET NUMBER DE04328310215
v.)	
DEPARTMENT OF AGRICULTURE)	Date: <u>21 DEC 1984</u>

OPINION AND ORDER

Viola Gordon (appellant) was removed from her position as a Biological Laboratory Technician, GS-5, based on her unacceptable performance. She appealed to the Board's Denver Regional Office. Following a hearing at which appellant left, on the advice of counsel, prior to the commencement of the agency's case-in-chief, the presiding official issued an initial decision sustaining the charge and affirming the removal.

Appellant, through new counsel, has filed a timely petition for review in which she makes several allegations.

First, she contends that she was denied her due process right to counsel because her attorney, through circumstances beyond appellant's control, did not attend the hearing. This contention is without merit.

The record indicates that on July 28, 1983, the presiding official issued an Order stating that the hearing would be held on October 18-19, 1983. She informed the parties that a request for postponement must be supported by an affidavit and would only be granted for good cause shown. See 5 C.F.R. § 1201.51. The presiding official also warned the parties

that they should not assume that any request for a postponement had been granted until they were advised that the hearing would be rescheduled. See Regional Office File at Tab 6.

With her petition for review, appellant submits a copy of a letter dated July 29, 1983 to the Regional Office from her then attorney requesting a postponement of the hearing because of a conflict in his schedule. This letter, if posted, was never received by the Regional Office and the hearing, attended by the agency and appellant, was held as scheduled on October 18.

The July 28 Order to the parties clearly put them on notice not to assume that the hearing would be postponed until they were so advised. Neither appellant nor her counsel was notified by the presiding official of a rescheduling during the 2-1/2 month period between the date of the request and the scheduled hearing date. A reasonable attorney, under the circumstances, would have inquired during the intervening period as to a new hearing date and not assumed that the hearing had been continued, as appellant's attorney erroneously did.^{1/} Since appellant is responsible for the errors of her chosen representative, Sofio v. Internal Revenue Service, 7 MSPB 493 (1981), appellant's contention is without merit.

Even assuming, arguendo, that the request for continuance was timely sent to the Board, it would not meet the criteria for granting a request for postponement since Board regulations require that the motion be supported by an affidavit showing good cause. 5 C.F.R. § 1201.51. The request of appellant's attorney did not comply with this requirement.

^{1/} We also note that appellant's attorney failed to notify appellant of his request for postponement. Appellant did attend the hearing on October 18, 1983, but left, on advice of counsel, prior to the agency's presentation of its case-in-chief.

Appellant next asserts certain contentions concerning an allegedly improper 1980 fitness for duty examination and ex parte communication between the deciding official and her supervisor, who was not the proposing official, during the removal process. Appellant claims that the presiding official erred in not considering these errors. However, these allegations were never raised before the presiding official and are made by appellant for the first time in the petition for review. Arguments raised for the first time in a petition for review need not be considered by the Board. Risher v. Department of the Army, 10 MSPB 372 (1982).

Finally, appellant contends that the presiding official erred in not considering her performance during the thirty day notice period. In Sandland v. General Services Administration, MSPB Docket No. PH04328310205 at 7 (October 22, 1984), this Board held that when an agency takes an action pursuant to 5 U.S.C. Chapter 43 based on unacceptable performance, it need not consider the employee's performance during the requisite notice period. Therefore, there was no error by the presiding official in her failure to consider appellant's performance during this period.^{2/}

^{2/} Appellant also contends that her due process rights to a hearing were denied because she was never notified of a hearing on October 29, 1983, the date stated for the hearing in the initial decision. The date stated in the initial decision is a typographical error. The hearing was held on October 18, 1983, and appellant was on notice of this date. Appellant has failed to show any prejudicial error denigrating her substantive rights resulting from the typographical error. See Karapinka v. Department of Energy, 6 MSPB 114 (1981).

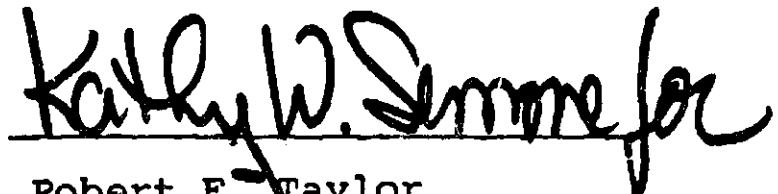
Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order.

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board